

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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AMERICORP FINANCIAL GROUP, INC., a/k/a  
AMERICORP FINANCIAL, INC.,

UNPUBLISHED  
January 25, 2007

Plaintiff-Appellant,

v

POWERHOUSE LICENSING, L.L.C., DABISH  
BROTHERS BUSINESS GROUP, L.L.C.,  
DABISH FAMILY TRUST, DALALY DABISH,  
WILLIAM DABISH, JR. and HENRY DABISH,

No. 271189  
Oakland Circuit Court  
LC No. 05-071492-PS

Defendants-Appellees.

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Before: Fort Hood, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition in favor of defendants on plaintiff's claim of fraudulent conveyance pursuant to the Michigan Uniform Fraudulent Transfer Act ("MUFTA"), MCL 566.31 *et seq.* We affirm.

In 1997, plaintiff entered into lease agreements for the rental of exercise equipment to defendants' predecessor corporation, Powerhouse Gyms International, Inc. ("PGI"). In January 1999, PGI sold its assets to defendant, Powerhouse Licensing, L.L.C. ("Powerhouse").<sup>1</sup> Shortly thereafter, in May 1999, PGI defaulted on its lease agreements with plaintiff. Following unsuccessful attempts to structure a payment plan with PGI, plaintiff initiated a lawsuit on September 17, 2002, against PGI for breach of the lease agreements, to recover its leased equipment and seeking a money judgment for the unpaid lease debt. In 2003, plaintiff commenced a separate court action seeking to recover a money judgment against the Dabish brothers, as individuals, who had personally guaranteed the equipment leases. Plaintiff asserted

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<sup>1</sup> The primary shareholders of both corporations, PGI and Powerhouse, were William and Norman Dabish (the "Dabish brothers"). Plaintiff asserts that, subsequently, Powerhouse Licensing, L.L.C., transferred the assets to the Dabish brothers and the other defendants named in this action.

an expectation of recovery of \$1,350,000 against PGI and the Dabish brothers from these lawsuits.

On December 30, 2005, plaintiff initiated the instant lawsuit against defendants, asserting the 1999 asset transfers were fraudulent. Specifically, plaintiff contended Powerhouse transferred the assets with “actual intent to hinder, delay or defraud” plaintiff, MCL 566.34(1)(a), and that Powerhouse received less than “a reasonably equivalent value in exchange for the transfer,” MCL 566.34(1)(b). Plaintiff further asserted that the asset transfer by Powerhouse was fraudulent because Powerhouse failed to receive “a reasonably equivalent value in exchange for the transfer” and that Powerhouse was insolvent at the time of the transfer. MCL 566.35(1). Plaintiff also sought relief from the other defendants as subsequent transferees of the assets pursuant to MCL 566.38(2).

While denying that fraudulent conveyances had occurred, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(7), asserting plaintiff’s alleged claims were time-barred in accordance with MCL 566.39, because plaintiff’s claims accrued at the time of the transfers in January 1999. In response, plaintiff asserted that its claims could not accrue until it had obtained a judgment in the underlying creditor actions against PGI and the Dabish brothers. Following oral argument, the trial court dismissed plaintiff’s claims as untimely, stating, in relevant part:

The claims brought under sec. 4 are for transfers made with intent to hinder or defraud a creditor and for a transfer made without receipt of a reasonably equivalent value in exchange. For these claims, the wrong occurred when the transfer was made, and not at a later date. These claims are barred by the six-year statute of limitations. The claims made under sec. 5 are for transfers made without reasonably equivalent value in exchange at a time when the debtor was insolvent. For these claims, the wrong occurred when the transfer was made, and not at a later date.

As to the subsequent transferees, a claim against a subsequent transferee is dependent upon proof of a claim for a fraudulent transfer under sections 4 or 5 of the act . . . . The statute does not create an independent claim against subsequent transferees, but merely allows relief from subsequent transferees under those conditions if the plaintiff prevails on a claim created under the act. Because the plaintiff’s claims under the act are barred by the statute of limitations, the plaintiff is not entitled to relief against subsequent transferees.

The trial court also denied plaintiff’s motion for reconsideration.

The only issue on appeal requires a determination by this Court of when a creditor’s cause of action challenging a fraudulent transfer, pursuant to MCL 566.39(a), accrues. Plaintiff contends the trial court erred in granting summary disposition, asserting its claim could not accrue until it had obtained a judgment in its lawsuits against PGI and the Dabish brothers and could not collect on the judgments. Defendants argue the trial court correctly determined the accrual period for the limitations period as initiating on the date of alleged fraudulent transfer of the assets by PGI to Powerhouse. This Court reviews a trial court’s determination that a claim is barred by the statute of limitations de novo. *McKiney v Clayman*, 237 Mich App 198, 200-201;

602 NW2d 612 (1999). In addition, the interpretation and application of a statute of limitations presents a question of law, which is also reviewed de novo on appeal. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003). When confronted with questions of statutory interpretation, this Court is required to discern and give effect to the intent of the legislature as expressed in the language of the statute. *Pohutski v Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002).

The MUFTA is structured to permit a creditor to avoid or remedy the effects of a debtor's fraudulent transfer. MCL 566.37. MCL 566.34 delineates the requirements for obtaining relief, stating in relevant part:

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following:

(a) With actual intent to hinder, delay, or defraud any creditor of the debtor.

(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor did either of the following:

(i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.

(ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due. [MCL 566.34.]

In addition, MCL 566.35 provides:

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(2) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

The ability to obtain relief under either subsection of the act is governed by MCL 566.39, defining the applicable statute of limitations for such conveyances. Specifically:

A cause of action with respect to a fraudulent transfer or obligation under this act is extinguished unless action is brought under 1 or more of the following:

(a) Sections 4(1)(a) and (b) and 5(1), within the time period specified in sections 5813 and 5855 of the revised judicature act of 1961, 1961 PA 236, MCL 600.5813 and 600.5855.

(b) Section 5(2), within 1 year after the transfer was made or the obligation was incurred. [MCL 566.39.]

Actions brought under § 4(1) and § 5(1) of the act are, therefore, expressly subject to “the time period specified in . . . MCL 600.5813,” which mandates an action be brought within a period of six years after the claim accrues. MCL 566.39(a). Accrual of a claim is defined by MCL 600.5827, which provides:

Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

Defendants contend that, for purposes of accrual of the statute of limitations, the relevant date was January 1999, when the alleged fraudulent transfers occurred. The trial court concurred in granting summary disposition. Based on the wording of MCL 566.34, the grant of summary disposition was correct because the alleged asset transfer comprised “the wrong upon which the claim is based.” MCL 600.5827. The goal of statutory construction is to discern and effectuate the intent of the Legislature. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). If the statutory language is clear and unambiguous, it is presumed that the Legislature intended the plainly expressed meaning of the statute and any further judicial interpretation or construction is neither required nor permitted. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000).

In contrast, plaintiff contends that its cause of action could accrue only when it obtained a judgment in its underlying creditor action. Plaintiff implies it could not have incurred harm until it was determined that the judgment obtained against Powerhouse was not collectible. Plaintiff’s position is contrary to case law, which holds that, “[t]he question when a cause of action accrues for statute of limitations purposes is not whether the plaintiff has knowledge of sufficient facts to prevail on a claim, but whether the plaintiff has knowledge of sufficient facts to cause a reasonable person to pursue an investigation that could uncover the evidence needed to lead to an ultimate victory.” *Moll v Abbott Laboratories*, 444 Mich 1, 21 n 25; 506 NW2d 816 (1993). Notably, this interpretation is also in conflict with MCL 600.5827, which states that a claim “accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.”

Plaintiff bases its argument, in part, on the definition of the term “claim,” as delineated within MCL 566.31(c), which provides:

“Claim means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

Plaintiff, relying almost exclusively on case law from other jurisdictions and the interpretation of statutory predecessors to the MUFTA, suggests that the language of this provision provides a creditor with the option of waiting to pursue a claim until it “is reduced to judgment.” This extrapolation of the definition language into an interpretation of accrual for the statute of limitations is not only tortuous, but also insupportable. If a statute provides its own definition, the term must be applied as expressly defined. *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 136; 545 NW2d 642 (1996); *Barrett v Kirtland Community College*, 245 Mich App 306, 314; 628 NW2d 63 (2001). In this context, the term “claim” is defined broadly to encompass “a right to payment,” without the imposition of restrictions such as the necessity of reduction to a judgment for the claim to be viable under the act. Hence, plaintiff’s assertion that this definition somehow operates as a tolling provision is without basis or justification.

The trial court also dismissed plaintiff’s MCL 566.35(1) claim based on accrual of the limitations period as being the date of assets transfer. While the six-year statute of limitations remains applicable, in accordance with MCL 566.39(1), for this provision of the act, the language of MCL 566.35(1) necessitates closer scrutiny. MCL 565.35(1) provides:

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation *and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.* [Emphasis added.]

For accrual of the limitations period under this provision to initiate, both the time of the transfer must be considered as well as the existence of the debtor’s insolvency to determine when “the wrong upon which the claim is based was done.” MCL 600.5827. In accordance with MCL 566.32(2), a debtor is presumed to be insolvent if they are “generally not paying his or her debts as they become due.”

The trial court determined that any alleged violation of MCL 566.35 was also time-barred based on the date of asset transfer. A review of the lower court record would affirm that, at the latest, evidence existed of PGI’s default on its obligations, through failure to pay on the lease agreement, by May 24, 1999. On that date, plaintiff entered into an amended lease agreement with PGI based on acknowledged defaults under the prior equipment lease. Even using this as the date for accrual for running of the six-year limitations period, the action is time-barred.

A cause of action does not “accrue” until all of the elements necessary for the claim have occurred and can be alleged within a complaint. *Moll, supra* at 15-16. Although Michigan has not established a bright-line rule, under MCL 600.5827, for determining when a defrauded person was harmed, this Court has found that fraud victims are injured when they do not receive what they expected to receive. *Mayhall v A H Pond Co, Inc*, 129 Mich App 178, 185; 341 NW2d 268 (1983). As such, plaintiff’s claim, pursuant to MCL 565.35(1), accrued when the assets were transferred and plaintiff entered into an agreement with PGI and was, as a result,

harm by the default on the payment schedule and the debtor's presumptive insolvency. This interpretation is consistent with Michigan case law, which recognizes that, "[t]he wrong is done when the plaintiff is harmed, rather than when the defendant acted." *Boyle v Gen Motors Corp*, 468 Mich 226, 231 n 5; 661 NW2d 557 (2003), citing *Stephens v Dixon*, 449 Mich 531, 534-535; 536 NW2d 755 (1995).

Finally, in reference to plaintiff's claim under MCL 566.38(2), the trial court properly dismissed the claim noting:

Section 8 provides that where a transfer is voidable under the act, a judgment may be entered against the first transferee or any subsequent transferee other than a subsequent transferee who took in good faith for value. MCL 566.38(1)(b). The statute does not create an independent claim against subsequent transferees, but merely allows relief from subsequent transferees under those conditions if the plaintiff prevails on a claim created under the act.

Because plaintiff's claims under MCL 566.34 and 566.35 were time-barred, plaintiff's claims against subsequent transferees are also precluded.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Michael J. Talbot

/s/ Deborah A. Servitto